Filed 5/18/16 In re G.D. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re G.D., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. ELIZABETH B., Defendant and Appellant.	F072514 (Super. Ct. No. JD125868-01) **OPINION**

APPEAL from orders of the Superior Court of Kern County. Louie L. Vega, Judge.

Seth F. Gorman, under appointment by the Court of Appeal, for Defendant and Appellant.

Theresa A. Goldner, County Counsel, and Elizabeth Giesick, Deputy County Counsel, for Plaintiff and Respondent.

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On August 28, 2015,[1] the juvenile court denied appellant Elizabeth B.'s (Elizabeth) Welfare and Institutions Code section 388[2] petition and terminated her parental rights to her four-year-old daughter G.D.[3] On appeal, Elizabeth contends the juvenile court erred in failing to assess her relative for placement and abused its discretion by denying her section 388 petition. We affirm the juvenile court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

G. first came to the attention of the Kern County Department of Human Services (Department) in January 2011, when she was taken into protective custody as a newborn because of Elizabeth's history of mental illness and methamphetamine use, and Elizabeth's failure to reunify with four of her other children. Her parental rights to them were terminated in 2008 and 2009. Elizabeth admitted she began smoking marijuana and methamphetamine when she was 12. When she was 14, she was diagnosed with manic depressive disorder. She acknowledged that her methamphetamine use resulted in her failure to regain custody of her other children, but claimed she stopped smoking methamphetamine when she found out she was pregnant with G.

In May 2011, the juvenile court exercised its dependency jurisdiction based on Elizabeth's substance abuse and child welfare histories, and ordered the Department to provide Elizabeth with reunification services, including participation in substance abuse counseling.[4] By that time, Elizabeth had completed a 45-day residential drug treatment program, was participating in outpatient substance abuse counseling, and was testing negative for drugs. Elizabeth continued to participate in her recovery until she left the

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[1] References to dates are to the year 2015, unless otherwise stated.

[2] Undesignated statutory references are to the Welfare and Institutions Code.

[3] G.'s presumed father, George D., died during the course of the proceedings. G. never lived with her father and had no contact with him.

[4] The juvenile court previously found untrue the allegation that Elizabeth was unable to care for G. due to her mental illness.

sober living program and tested positive for methamphetamine in August 2011. In September, she returned to the program and subsequently tested negative.

Following a contested review hearing held in December 2011, the juvenile court terminated reunification services and set a section 366.26 hearing.[5] The juvenile court, however, reinstated Elizabeth's reunification services in April 2012, when it granted her section 388 petition. Elizabeth had been enrolled in a sober living program since September 2011 and had tested clean for six months. In July 2012, G. was returned to Elizabeth's custody and family maintenance services were ordered for Elizabeth. In January 2013, the juvenile court awarded Elizabeth sole legal and physical custody of G. and terminated dependency jurisdiction.

Nearly two years later, on December 5, 2014, the Department took nearly four-year-old G. into protective custody and filed a petition alleging G. fell within the provisions of section 300, subdivisions (b) and (j), following its investigation of a referral it received the prior month that alleged Elizabeth was using methamphetamine, left G. unsupervised, and fought with her boyfriend in front of G. During a social worker's interview of Elizabeth on November 20, 2014, Elizabeth admitted drinking alcohol twice a week, sometimes to intoxication, but denied drug use, claiming that she last smoked methamphetamine a year before. Elizabeth denied that G. wandered around outside unsupervised. Elizabeth and G. lived with Elizabeth's boyfriend, James R. Elizabeth had a large black eye; at first she denied domestic violence between herself and James, but eventually admitted she had a physical confrontation with James in front of G. The social worker gave Elizabeth a resource directory and recommended she contact the Alliance Against Family Violence (Alliance). Elizabeth, however, was hesitant about contacting the Alliance, as she admitted she also was a perpetrator of the violence. Elizabeth also

[5] Elizabeth filed a petition for extraordinary writ from the setting order, which we denied in *In re Elizabeth B.* (Feb. 21, 2012, F063866) [nonpub. opn.].

declined "Differential Response Services." Elizabeth stated she was responsible for drinking too much alcohol, which caused problems with James. Elizabeth wanted to retain her relationship with James and said she would stop drinking. The social worker had a "stern conversation" with Elizabeth about her responsibility to protect G. from the trauma and physical dangers of domestic violence. Elizabeth submitted to a voluntary drug test, which was confirmed positive for amphetamine and methamphetamine.

The social worker next visited Elizabeth's home on December 3, 2014. Elizabeth said that James had been in and out of the home, and she could not keep him out because he was on the lease. Elizabeth refused to call police for an emergency protective order because James was the only father G. had known. Elizabeth had a large bruise on her left arm, but she denied any domestic violence since the last visit, explaining that the bruise was from the incident she reported on November 20. Elizabeth asked G. to tell the social worker what she had seen; G. replied, "he smashed your head under the bed." Elizabeth asked for voluntary family maintenance services, but the social worker said the referral still was under investigation. Elizabeth declined to voluntarily drug test; Elizabeth said the test would be dirty because she smoked marijuana and methamphetamine earlier that day. The social worker provided Elizabeth with the contact information for the Alliance and referred her to the "Gatekeeper" for drug abuse counseling services.

The petition the Department filed alleged that G. had suffered, or there was a substantial risk she would suffer, serious physical harm or illness due to Elizabeth's inability to adequately supervise or protect G., as she admitted to having a physical altercation with her boyfriend in G.'s presence, and her inability to provide regular care to G. due to her substance abuse. The petition further alleged that G.'s siblings had been abused or neglected, and there was a substantial risk that G. would be abused or neglected, citing to the prior dependency cases in which dependency jurisdiction was taken over four of her other children due to her substance abuse or mental health issues, which culminated in the termination of Elizabeth's parental rights.

At the December 10, 2014 detention hearing, Elizabeth's attorney informed the juvenile court that there was a paternal aunt, Christina G., who the attorney believed had already applied for placement. The attorney stated that while G.'s father had not been in the picture, Christina had. The attorney further stated: "We'd certainly like to see that happen as quickly as possible, hopefully before Christmas, so G[] doesn't have to spend Christmas with strangers. But, hopefully, the department will get on it as quickly as possible." The juvenile court ordered G. detained from Elizabeth, vested responsibility for the temporary placement, care, custody and control of G. with the Department pending further disposition or court orders, and set a jurisdiction/disposition hearing.

Elizabeth had a recommended case plan of parenting, domestic violence as a victim, substance abuse treatment and drug testing. In January 2015, she entered a residential drug treatment program. By the March 4, 2015 jurisdiction hearing, Elizabeth had completed her inpatient substance abuse treatment and was to begin an outpatient program. She had been drug testing regularly with negative results since January, and was halfway through her parenting program. The juvenile court found the petition's allegations true after Elizabeth submitted on the social worker's reports.

In reports prepared for the disposition hearing, the Department recommended that Elizabeth be denied family reunification services under section 361.5, subdivision (b)(10) and (11), because she had failed to reunify with G.'s siblings in the other cases and failed to address the issues that led to G. coming into protective custody for a second time.

The day after Elizabeth was discharged from her inpatient program, she called social worker Tamara Roberts and admitted she had relapsed. A drug test Elizabeth submitted to the Department was positive for amphetamines and methamphetamine. The Department suggested that Elizabeth re-enroll in a substance abuse program. On April 15, Elizabeth's substance abuse counselor told Roberts that she was modifying Elizabeth's treatment plan to return to residential treatment, but Elizabeth, who was "one day clean," did not want to go and wanted to continue with outpatient services.

Elizabeth was arrested on a charge of inflicting corporal injury on a spouse or cohabitant on April 18. James reported to police that during a verbal argument with Elizabeth, Elizabeth stepped on his foot and shoved him to the ground with both hands. Elizabeth then grabbed a flashlight and hit herself in the face several times. Elizabeth at first denied to police that anything happened, but she later admitted they had verbally argued. She also denied that the argument became physical, but when told that James was saying it had, she said that he was walking towards her, so she put her foot on his and barely pushed him. She said that he "fell down all dramatically like a baby." On April 21, Elizabeth pled nolo contendere to misdemeanor infliction of corporal injury on a spouse or cohabitant. Her sentence included three years' probation, restitution, a fine, and completion of eight hours of community service and a 52-week domestic violence class.

With respect to relative placement, paternal aunt Christina, and her spouse, Jessie G., applied for placement of G. on December 10, 2014. The application was assigned to the relative assessment unit on January 5. Relative notification letters were mailed to three maternal and paternal family members who were located, but none of them had contacted the Department or submitted a placement application. G. was in a foster family agency home and was doing well in her placement.

Christina's placement application was submitted to the supervisor for final approval on March 25, with an initial approval date of March 18. At a team decision meeting held on April 7, however, the Department decided to keep G. in her current placement. On April 8, Christina called Roberts and said that she and her husband wanted to pursue getting custody of G. Roberts told Christina it was decided at the meeting not to change G.'s placement and Christina had not provided information in her relative assessment, such as her mental health issues. Christina responded that she did not have a real mental health issue; she had panic attacks for which she takes pills the doctor gave her. Roberts told Christina she would speak to her supervisor.

Christina called Roberts the next day. Roberts again told Christina that the decision was made at the meeting. Christina said she felt that a lot of information was slammed on her and her husband, it was unfair, and she did not realize the decision was being made at the meeting. Roberts told Christina she had been sent a denial letter on April 8, with a grievance form attached to it, and she should follow the grievance procedures. Christina called Roberts again on April 10 regarding the grievance procedure. Christina said she "did not know they were being denied placement of G." Roberts again told Christina the decision was made at the meeting to maintain G.'s placement. Christina asked if she had to go in front of a judge for the grievance hearing. Roberts said "no, but other staff at the department." Christina said she would do the paperwork and see where it went. There is nothing in the record, however, to indicate that Christina submitted a grievance form or followed the grievance procedures.

Elizabeth was not present at the April 28 disposition hearing. The parties all submitted on the reports. The juvenile court exercised its dependency jurisdiction; placed G. in the care, custody and control of the Department for suitable home placement; removed G. from Elizabeth's custody; denied Elizabeth family reunification services; found that the Department had used due diligence in conducting its investigation to identify, locate and notify G.'s relatives; and granted Elizabeth two-hour supervised visits every two weeks. The juvenile court set a section 366.26 hearing for August 28. On April 28, the clerk mailed to Elizabeth notification of her right to file a petition for extraordinary writ and a blank petition, but Elizabeth did not file a petition.

On August 4, Elizabeth's attorney filed a section 388 petition on her behalf, in which she asked the juvenile court to order family reunification services or maintenance for her. As changed circumstances, the attorney asserted that Elizabeth: (1) was enrolled in and regularly attended a 52-week domestic violence course; (2) had completed residential substance abuse treatment; and (3) had been submitting to monthly random unannounced urine drug tests since May 19, and all nine tests had been negative. The

attorney asserted that ordering reunification services would be in G.'s best interest because it would allow Elizabeth the opportunity to reunify with G. and give G. the opportunity to have Elizabeth in her life permanently.

Attached to the petition were the following documents: (1) an enrollment report showing that Elizabeth enrolled in the 52-week domestic violence program on June 12; (2) a certificate of completion of the "Phase One Anger Management Group" issued by Jason's Retreat residential substance abuse treatment program; (3) a certificate of participation in Bakersfield Recovery Services, Capistrano, residential program of recovery issued on July 3; (4) a June 19 letter from a Bakersfield Recovery Services counselor stating that Elizabeth entered substance abuse treatment on May 19, she was participating in a structured residential program which addressed certain topics in a group setting, she was attending a court-approved parenting class, she was meeting with the counselor weekly, she actively participated in the 12-step program, and she was displaying a positive attitude and continued willingness to change her life for the better; (5) a July 7 letter from the same counselor stating Elizabeth successfully completed the treatment program on July 3 and was residing at Jason's Retreat, Sober Living for Women, and would be attending outpatient services on July 10; and (6) nine negative drug test results.

The juvenile court set a hearing on the petition for the same date as the section 366.26 hearing. In a report prepared for the section 366.26 hearing, the Department recommended termination of parental rights and that G. be freed for adoption. G. had been in her pre-adoptive foster home since December 22, 2014. G. was described as active and smart, with an energetic personality, who had not been diagnosed with any severe medical or developmental problems. G. was receiving mental health services to learn about appropriate boundaries and to improve her social skills. G.'s caregivers were committed to adopting her.

From December 10, 2014 to April 28, 2015, Elizabeth had the opportunity to visit G. 35 times; she attended 22 of those visits. From April 28 until mid-August 2015, Elizabeth had attended all seven of her scheduled visits. Elizabeth was attentive and interacted appropriately with G. at the visits, but from time to time she appeared distracted and dozed off. G. interacted with Elizabeth and willingly went to her. The social worker noted the two had a strong attachment, as G. had lived with Elizabeth the majority of her life and Elizabeth maintained contact through visits, but G. no longer looked to Elizabeth for her daily physical and emotional needs since she had been out of Elizabeth's care for the past six months. Instead, G. looked to her caregivers as the primary parental figures in her life, and had developed an attachment to, and a positive relationship, with them. For these reasons, the Department recommended termination of parental rights. While it was likely G. would experience some adjustment issues, the benefit and permanency of adoption outweighed any detriment caused by severing the parent/child relationship.

The Department filed a supplemental social study in which it recommended denial of Elizabeth's section 388 petition. A social worker visited Elizabeth on August 17 at her sober living home. Elizabeth started a 16-week parenting class on May 20, which she would complete by September 2, and she would complete her outpatient services within six months. She planned to stay at the sober living facility for six months to a year. Elizabeth said she had been clean since May 14. Elizabeth said she and her daughter needed each other, and she felt purposeful; her purpose was to be G.'s mom and G. needed her love and wanted to heal with her. Elizabeth said she had a good support system. G. could move into the facility with Elizabeth.

The social worker also visited the caretakers and G. The caretakers said that G. had nightmares and terrors after almost every visit with Elizabeth. The social worker spoke with G. alone. The social worker asked where she would live if she could live anywhere in the world; G. responded that she would live with her mom "because she is

very tall." G. mentioned she liked to see her mom because she got "hot pockets" every weekend.

The social worker noted that while Elizabeth had made some progress toward addressing the problems that led to G.'s removal, she still had to complete the domestic violence class and outpatient program, and had been drug and alcohol free for only three months. Based on these facts, coupled with Elizabeth's failure to reunify with G.'s four half-siblings and her relapse on May 14, the Department's position was that she not be offered family reunification services and it would be premature to return G. to her with family maintenance services.

The Department submitted a supplemental report, in which it asserted the nine drug screens from the substance abuse treatment program were "dip tests" which the Department did not accept as valid drug test results. This was because the tests were not considered to be accurate representations of a person's drug use, as they did not screen for many of the commonly abused controlled substances, did not provide the set levels of drugs in the system, and it was unknown whether they met the requirements for randomness and observation.

At the August 28 hearing, the juvenile court first addressed the section 388 petition. Elizabeth testified on her own behalf. She confirmed that she completed the 45-day residential program at Capistrano Community for Women, and thereafter she went to live at the sober living environment, where she still was living. She said her participation in the outpatient substance abuse program was excellent. She completed the 12-week anger management course, would complete parenting on September 9, and had completed 10 of the 52 domestic violence classes. She had been drug testing as part of the residential and outpatient programs since May 19, and her tests were all negative. She was expected to finish the outpatient program in March 2016.

Elizabeth had taken domestic violence as a victim, a parenting class, and participated in a sober living program before. This was the first time she had taken

domestic violence as a perpetrator. She had not taken anger management before. She had asked the juvenile court for services in the past based on her positive progress. This time was different, however, because she was honest, open-minded, open to suggestions, and had learned to listen. If she got G. back, she would be consistent by setting a daily routine with time set aside for the two to "have fun" and "adventures." Elizabeth said she has a support system in place comprised of the women in Narcotics Anonymous and her sponsor. She attended individual counseling sessions at her outpatient program once a week; the sessions would continue for the first three months of her early recovery and after that, she believed she would see the counselor once a month. She also was attending self-help meetings, such as Narcotics Anonymous, four times or more a week, including church. She was not attending meetings, going to church or using her sponsor when G. was removed from her care in November 2014. Elizabeth described her visits with G. as very good and G. was happy to see her. Elizabeth was prepared to have G. in her care that day if the judge were to grant her request. G. would stay with her in her sober living apartment.

Elizabeth's attorney asked the juvenile court to grant the section 388 petition. The attorney argued that things were different this time, as Elizabeth had a support system, and she had attempted to show she had changed by working on her classes and programs, and submitting negative drug tests. Moreover, visits with G. went well. G.'s attorney argued that while Elizabeth had perhaps made more progress than she had ever made before, the circumstances had not changed and the focus had to shift to what was best for G., which was permanency. County counsel asked the juvenile court to deny the petition, as Elizabeth's circumstances were changing, not changed, and it was not in G.'s best interest to grant the petition and delay permanency.

The juvenile court denied the petition, finding the evidence to be overwhelming. It explained that while Elizabeth had her opportunity and succeeded, it had not lasted long. Elizabeth was 20 percent into the domestic violence program, not as a victim but as

a perpetrator. She had three months of sobriety in a controlled environment and had not been able to demonstrate she was able to take care of herself on her own, much less to accept responsibility for a young child who was getting to the age where adoptability would become an issue. The juvenile court found that while Elizabeth had shown she was making efforts, she had not demonstrated changed circumstances and she had not changed to the extent that it could grant the petition.

The juvenile court moved on to the section 366.26 hearing. Elizabeth's attorney asked the court to find the parent-child benefit exception to adoption applied, as there was a strong attachment and bond between G. and Elizabeth, and G. said she wanted to live with her mother. The juvenile court found that the benefit of permanency of adoption outweighed the strong attachment between G. and Elizabeth, and that G. was likely to be adopted, and terminated parental rights.

DISCUSSION

Relative Placement

Elizabeth contends the Department and the juvenile court violated their statutory obligation to assess her and Christina's request for placement of G. with Christina under the requirements of section 361.3. She asserts that because the Department "made no discernable effort" to provide the juvenile court with the information mandated by section 361.3, and the juvenile court "made no discernable effort" to independently assess whether to place G. with Christina, both the Department and the juvenile court failed to afford Christina the preferential consideration she was entitled to under section 361.3. Given these failures, she argues that remand is required for the juvenile court to investigate and consider the requests for placement of G. with Christina under section 361.3.

When a child is removed from parental custody under section 361 and a relative seeks placement under section 361.3, the juvenile court is to give "[p]referential consideration" to the request, meaning "that the relative seeking placement shall be the

first placement to be considered and investigated." (§ 361.3, subds. (a) & (c)(1).) The assessment of relatives involves consideration of eight factors set out in the statute, including the best interest of the child; the wishes of the parent, relative and child; the placement of siblings and half-siblings in the same home; the relative's "good moral character"; the nature and duration of the relationship between the child and relative, and the relative's desire to care for, and provide legal permanency for, the child; the relative's ability to provide a safe, secure, and stable environment for the child, and to protect the child from his or her parents; and the safety of the relative's home. (§ 361.3, subd. (a)(1) through (8).) "The county social worker shall document these efforts [to assess the relative according to the statutory factors] in the social study prepared pursuant to section 358.1." (§ 361.3, subd. (a).)

The preference applies at the dispositional hearing and "whenever a new placement of the child must be made," in which case, "the county social worker shall consider whether the relative has established and maintained a relationship with the child." (§ 361.3, subd. (d).) "When section 361.3 applies to a relative placement request, the juvenile court must exercise its independent judgment rather than merely review [the Department's] placement decision for an abuse of discretion." (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1033 (*Cesar V.*).) "If the court does not place the child with a relative who has been considered for placement pursuant to [] section [361.3], the court shall state for the record the reasons placement with that relative was denied." (§ 361.3, subd. (e).)

We will assume without deciding that Elizabeth has standing to raise the issue on appeal. (See *In re K.C.* (2011) 52 Cal.4th 231, 236-239; *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1053-1054; *In re H.G.* (2006) 146 Cal.App.4th 1, 10; *Cesar V.*, *supra*, 91 Cal.App.4th at pp. 1034-1035.) We agree with the Department, however, that Elizabeth forfeited her contention that the Department and juvenile court failed to assess Christina's placement request under the requirements of section 361.3 by failing to raise

the issue in the juvenile court and failing to file a petition for extraordinary writ from the juvenile court's order setting the matter for a section 366.26 hearing.

First, Elizabeth failed to raise the relative placement issue with the juvenile court at the April 28 hearing. "It is true that . . . a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. (*Saunders*, at p. 590.) [¶] Dependency matters are not exempt from this rule. (See, e.g., *In re Dakota S* . (2000) 85 Cal.App.4th 494, 502 [(*Dakota S.*)] [failure to obtain supervising agency's assessment of prospective guardian under § 366.22, subd. (b)]; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339 [failure to request court to order bonding study]; *In re Kevin S.* (1996) 41 Cal.App.4th 882, 885-886 [failure to challenge setting of § 366.26 permanency planning hearing when court determined that no reasonable reunification efforts were made].)" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 (*S.B.*), fn. omitted.)

While application of the forfeiture rule is not automatic, the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. (*S.B.*, *supra*, 32 Cal.4th at p. 1293.) "Although an appellate court's discretion to consider forfeited claims extends to dependency cases [citations], the discretion must be exercised with special care in such matters. 'Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code.' [Citation.] Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance. (§ 366.26.)" (*S.B.*, *supra*, 32 Cal.4th at p. 1293.)

In this case, Elizabeth did not raise the Department's failure to address the factors set forth in section 361.3 when assessing Christina's placement application or the juvenile court's failure to state the reasons for its denial of relative placement at the

disposition hearing, thereby depriving the juvenile court of the ability to correct any alleged legal error. Accordingly, Elizabeth has forfeited her challenges on appeal to the juvenile court's purported failure to assess Christina for placement.

Elizabeth asserts she should be able to raise the issue here because the record does not show that she knowingly waived the request for placement, citing *In re Rodger H.* (1991) 228 Cal.App.3d 1174 (*Rodger H.*). The loss of the right to challenge a ruling on appeal, however, is not a waiver, which is an " ' "intentional relinquishment or abandonment of a known right[,]" ' " but rather is a forfeiture, because the person failed to preserve the claim. (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293, fn. 2.) For that reason, *Rodger H.* is inapplicable here, as it involves the issue of whether grandparents waived their request for placement by failing to contact the social worker, not whether the grandparents forfeited their appellate claim by failing to object in the trial court.

Next, Elizabeth contends the Department and juvenile court should be estopped to deny her the benefits of section 361.3 because the social worker told Christina that her remedy was a grievance hearing in the Department, not before a judge. It is not clear from the record that Christina was given incorrect information. The record shows that the Department provided Christina with a grievance form and procedures (which are not included in the appellate record), she was advised to follow those procedures, and when Christina asked whether she would have to go in front of a judge for the grievance hearing, the social worker told her the hearing was held before Department staff, not a judge. The social worker did not tell Christina that she could not ultimately ask the juvenile court to review the placement decision. More importantly, Elizabeth fails to explain how the information given to Christina misled her or her attorney into believing that she could not raise the issue before the juvenile court.

Finally, Elizabeth asserts that she was not required to object because section 361.3 imposed mandatory duties on the Department and the juvenile court which cannot be waived or forfeited. In support, Elizabeth cites *Melinda K. v. Superior Court* (2004)

116 Cal.App.4th 1147 (*Melinda K.*), and *Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996 (*Mark N.*), which both held that "[a] parent is 'not required to complain about the lack of reunification services as a prerequisite to the department fulfilling its statutory obligations.' " (*Melinda K.*, *supra*, 116 Cal.App.4th at p. 1158, citing *Mark N.*, *supra*, 60 Cal.App.4th at p. 1014.) Thus, in *Mark N.*, the Court of Appeal held that an incarcerated father was not required to complain that he was not receiving the reunification services that had been ordered because the agency is required to offer or provide reasonable reunification services to an incarcerated parent and is not relieved of that responsibility because the parent did not request services. (*Mark N.*, at p. 1014.)

Here, section 361.3 required the Department to assess any relative who requested placement of G. After Christina requested placement, the Department assessed her and then decided not to place G. with her. Elizabeth's complaint on appeal is not that the Department failed in its statutory obligation to assess Christina for placement, but that it failed to include in its reports a discussion of the factors it was required to consider during its assessment, thereby depriving the juvenile court of the information it was required to consider when making its placement decision. Thus, Elizabeth is contending that the Department's reports were inadequate. Such a claim is subject to forfeiture for failure to object, just as a parent forfeits a claim that an adoption assessment does not comply with the statutory requirements where the parent fails to object to the adequacy of the assessment in the juvenile court. (E.g., *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412 [failure to object to assessment report at section 366.26 hearing waived the issue of the report's inadequacy].) One rationale for this rule is that it is " ' "unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial." ' " (*Dakota S.*, *supra*, 85 Cal.App.4th at p. 501, italics omitted.)

We see no reason why the general rule of forfeiture should not apply here. "Any other rule would ' " 'permit a party to play fast and loose . . . by deliberately standing by

without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.' " ' " (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412.)

Even assuming Elizabeth had not forfeited her challenge by failing to object below, her challenge is not cognizable on appeal because she failed to pursue extraordinary writ review from the April 28 orders. An order setting a section 366.26 hearing and "any [other] order, regardless of its nature, made at the hearing at which a setting order is entered" must be challenged by filing a petition for extraordinary writ review. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1021, 1023–1024 (*Anthony B.*); § 366.26, subd. (*l*); see Cal. Rules of Court, rules 8.450, 8.452.) Generally, a party cannot challenge such orders in an appeal unless the party timely filed a petition for writ review and "[t]he petition ... was summarily denied or otherwise not decided on the merits." (§ 366.26, subd. (*l*)(1)(A), (C), (*l*)(2).) "Section 366.26, subdivision (*l*) applies to all 'issues arising out of the contemporaneous findings and orders made by a juvenile court in setting a section 366.26 hearing.' " (*Anthony B.*, *supra*, 72 Cal.App.4th at p. 1022.)

Here, the only time relative placement was at issue was at the April 28 disposition hearing. The juvenile court set the matter for a section 366.26 hearing without placing on the record its assessment of Christina's placement request that Elizabeth claims was statutorily required at that time. Elizabeth was therefore obligated to seek relief from the juvenile court's purported legal error by filing the required writ petition for extraordinary relief. Her failure to do so precludes her from raising that legal challenge on appeal.

Elizabeth contends that she was not required to file a writ petition in order to preserve the relative placement issue she raises in this appeal because "there was no order reflecting court consideration or rejection of the request for placement with the relative." In support, she relies on *In re Cynthia C.* (1997) 58 Cal.App.4th 1479 (*Cynthia C.*). There, sometime after the agency removed the minor from her paternal aunt and uncle's

home, the couple filed a section 388 petition seeking return of the minor. On appeal from the denial of the section 388 petition, the agency argued the appeal should be dismissed as untimely because it was filed more than one year after the minor was removed from the home. The Court of Appeal concluded the appeal was not untimely because there was no order that triggered the 60-day period within which an appeal must be filed, as the agency removed the minor from the home without a court order. (*Cynthia C.*, *supra*, 58 Cal.App.4th at p. 1488.)

While it is true that the juvenile court did not make an express finding on relative placement at the April 28 hearing, the juvenile court did specifically order G. "placed in the care, custody and control of the department for suitable home placement." Since by the time of the April 28 hearing the Department had denied Christina's request for placement, and this denial was reflected in its social study reports prepared for that hearing, the juvenile court's placement order confirmed the Department's decision not to place G. with Christina. It was incumbent on Elizabeth, if she wished to argue that Christina was not assessed properly or that G. should have been placed with Christina, to raise that argument via a writ petition.

Elizabeth seeks to avoid the forfeiture bar by contending on appeal that she received ineffective assistance of counsel when her attorney failed to file a section 388 petition to compel the juvenile court to order the Department to complete its assessment or to order placement with Christina.

Elizabeth has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, she must show that "(1) trial counsel failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates, and (2) had counsel rendered competent service the outcome of the hearing would have been more favorable to the client." (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 237 (*Arturo A.*).)

"In general, the proper way to raise a claim of ineffective assistance of counsel is by writ of habeas corpus, not appeal. [Citations.] However, an ineffective assistance claim may be reviewed on direct appeal [only] where 'there simply could be no satisfactory explanation' for trial counsel's action or inaction." (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, fn. 1; accord, *In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1253.) Establishing ineffective assistance of counsel "most commonly requires a presentation which goes beyond the record of the trial. . . . Action taken or not taken by counsel at a trial is typically motivated by considerations not reflected in the record. It is for this reason that writ review of claims of ineffective assistance of counsel is the preferred review procedure. Evidence of the reasons for counsel's tactics, and evidence of the standard of legal practice in the community as to a specific tactic, can be presented by declarations or other evidence filed with the writ petition." (*Arturo A., supra,* 8 Cal.App.4th at p. 243; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Here, we cannot say that Elizabeth's attorney's failure to file a section 388 petition constituted ineffective assistance of counsel because there may have been practical reasons why the attorney failed to do so. Elizabeth may have given her attorney reason to believe that she no longer wanted G. placed with Christina, or Christina may have decided that she no longer wanted placement of G. Alternatively, her attorney may have concluded, based on evidence that is not in the record, that Christina was not an appropriate placement, and therefore the petition would have little probability of success.

The Section 388 Petition

Elizabeth contends the juvenile court abused its discretion in denying her section 388 petition. We disagree.

A petition to modify a juvenile court order under section 388 must allege facts showing that new evidence or changed circumstances exist, and that changing the order will serve the child's best interests. (§ 388, subd. (a).) The petitioner has the burden of

proof by a preponderance of the evidence. (Cal. Rules of Court, rule 5.570(h)(1)(C).) In assessing the petition, the court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

We review the denial of a section 388 petition after an evidentiary hearing for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*).) Where there is conflicting evidence, we reverse only if the evidence compels a finding for the appellant as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527–1529.)

The best interests of the child are of paramount consideration when, as here, a section 388 petition is brought *after* reunification services have been denied. (See, e.g. *Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In assessing the best interests of the child at this juncture, the juvenile court's focus is on the needs of the child for permanence and stability rather than the parent's interests in reunification. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*).)

The " 'escape mechanism' " provided by section 388 after reunification efforts have ceased is only available when a parent has completed a reformation before parental rights have been terminated. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528 (*Kimberly F.*).) This is because, if a parent's circumstances have not changed sufficiently to permit placement of the child with that parent, reopening reunification "does not promote stability for the child or the child's best interests" when the child is otherwise adoptable. (*Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

Here, the juvenile court found that although Elizabeth's circumstances were changing, they had not yet changed. Elizabeth had a longstanding drug problem which

she had difficulty overcoming, despite having lost four children to adoption. She had completed the drug treatment in the first dependency case involving G., only to relapse within two years. Her drug use continued even after G. was removed in this proceeding. While she entered inpatient treatment within a month of G.'s removal, she relapsed once she was outside the program's highly structured environment. She was able to again achieve sobriety only by reentering an inpatient program. By the time of the contested hearing, Elizabeth had been in recovery for approximately three and a half months. She still had six months of outpatient substance abuse treatment to complete the program and had yet to live outside the program's confines. She also had completed only 10 of the 52 domestic violence as a perpetrator classes.

Without dismissing or diminishing Elizabeth's accomplishments, her ability to maintain sobriety within the confines of a structured setting was nonetheless insufficient to demonstrate she had made sufficient inroads into her persistent substance abuse problem that returning G. to her or resuming reunification services would be appropriate. (See, e.g. *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [parents with extensive drug use history did not show changed circumstances where rehabilitation efforts were only three months old at time of section 366.26 hearing]; *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423 [seven months' sobriety does not constitute changed circumstance where parent has history of periods of sobriety and relapses]; *Kimberly F., supra,* 56 Cal.App.4th at p. 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform"].) At most, Elizabeth showed her circumstances were changing. (*Casey D., supra,* 70 Cal.App.4th at p. 49.) The juvenile court did not abuse its discretion in finding Elizabeth failed to show a genuine change in circumstances that would merit considering resuming reunification services or placing G. with her. Accordingly, we need not reach the issue of whether it was also in G.'s best interest to grant Elizabeth reunification services.

DISPOSITION

The orders denying Elizabeth's section 388 petition and terminating parental rights are affirmed.

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GOMES, Acting P.J.

WE CONCUR:

_____
PEÑA, J.

_____
SMITH, J.